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IN THE SUPREME COURT OF THE UNITED STATES

Number 348

October Term, 1951

Mary K. Ellis, Petitioner

vs.

Girard Trust Company, Surviving Trustee Under the Will of George W. Nevil,
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the Commonwealth of Pennsylvania

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in 367 Pa. 30. The subsequent petitions and orders are not reported but are set forth in the Record on pages 597 et seq.

JURISDICTION

The above entitled cause was argued and submitted to the Supreme Court of Pennsylvania on January 3, 1951 and an opinion rendered and judgment entered on March 27, 1951, by the Supreme Court of Pennsylvania.

Pennsylvania Supreme Court Rule No. 69 states:

> "Rule 69. Petitions for reargument must be made before the record is returned to the court below, unless this court, upon cause shown, shall extend the time; and must specify particularly the point supposed to have been overlooked or misapprehended by the court (with a proper reference to the portions of the original Brief or Record relied on to establish the fact alleged) the reasons for a rehearing, and arguments in favor thereof. Attached thereto shall be a copy of all the opinions filed in the case; and, accompanying it, a copy of all the Briefs used in the argument of the case."

The docket entries (Record page 597) disclose that Petitioner complied with this rule by filing a petition for reargument on April 5, 1951. This petition was denied on April 16, 1951 and the record remitted to the court below on April 17, 1951. The Supreme Court of Pennsylvania did not grant the petitioner an extension of time for filing a second petition for reargument. Final judgment was therefore entered by the

Supreme Court of Pennsylvania on April 16, 1951. See: *Citizens' Bank vs. Opperman,* 249 U.S. 448.

Thereafter, on June 22, 1951, Petitioner filed a Petition for Leave to File a Second Petition for Reargument. This Petition was denied July 20, 1951. By this subterfuge, Petitioner now claims final judgment was not entered until this latter date.

The petition for a writ of certiorari was filed by petitioner on September 22, 1951, more than three months since the entry of judgment by the Supreme Court of Pennsylvania, and the period for applying for a writ of certiorari has not been extended by a Justice of this Court (U.S.C. Title 28, Sec. 2101 (c) and Rule 38 of this Court).

Therefore, it appears that petitioner's application for a writ of certiorari is out of time and should be denied.

It is well settled that this Court will not review a decision of a State Court unless it affirmatively appears from the record that a federal question was presented to the highest court of the State having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. The record clearly discloses that no federal question was raised in the instant cause until petitioner filed the Petition for Leave to File a Second Petition for Reargument on June 22, 1951, more than two months after the Pennsylvania Supreme Court's decision had become final. The federal question therefore appears for the first time *after* the petition for reargument had been dismissed. This Court has held that raising the federal

question for the first time in a petition for reargument itself is insufficient unless the Court actually entertains the petition and expressly decides the question. See: *Radio Station WOW vs. Johnson,* 362 U.S. 120, 128. The Supreme Court of Pennsylvania did not entertain the petition for reargument or the petition for leave to file a second petition for reargument.

Therefore, it appears that petitioner never presented a federal question to the Supreme Court of Pennsylvania and this court therefore has no jurisdiction of the cause.

Further, there is no federal question involved in the determination of the instant cause because this Court has repeatedly held that the judicial construction of a Will by a State Court determines not only legally but practically the extent and character of the interests taken by the legatees and is binding on the federal courts. See: *Sharpe vs. Commissioner of Internal Revenue,* 107 F. 2nd 13, 14, certiorari denied 309 U.S. 665.

For the foregoing reasons, respondent respectfully submits that this Court does not have jurisdiction of the instant cause.

QUESTIONS PRESENTED

The questions presently before this Court are:

1. Is a Petition for a Writ of Certiorari in time when filed more than three months after the decision below became final?

2. Has Petitioner properly raised the federal question by inserting it in a pleading entitled "Petition for Leave to File a Second Petition for Reargument"?

3. Will this Court review a decision of a State Court construing a Will?

4. Did the Supreme Court of Pennsylvania, by affirming the action of the lower court, deny the Petitioner due Process under the 14th Amendment of the Constitution of the United States by preventing proof of the alleged contract between the decedent and the petitioner and thus deny the parties a fair hearing?

Respondent respectfully represents that the answer to each of the foregoing questions is in the negative.

[redacted]

STATUTE AND REGULATIONS INVOLVED

There are no federal Statutes or Regulations involved in the instant cause. The only questions presented to the Supreme Court of Pennsylvania involved the construction of a Will and the extent and character of the interest taken by the Petitioner under the terms of the said Will.

ARGUMENT

The issue presently before this Court is whether this Court will review the decision of a State Court construing a Will when no federal question is involved and when the petition for a Writ of Certiorari is out of time.

I. The Petition for a Writ of Certiorari Is Out of Time

and

II. There Was no Federal Question Presented to the Supreme Court of Pennsylvania

The Supreme Court of Pennsylvania rendered an opinion and entered judgment thereon on March 27, 1951. Under the rules of that Court, any petition for reargument must be made before the record is returned to the Court below, unless the Court, upon cause shown, extends the time (Pennsylvania Supreme Court Rule No. 69, supra). Petitioner herein did file a Petition for reargument prior to the time the record was returned to the Court below. No federal question was presented to the Pennsylvania Supreme Court at that time nor had any federal question been raised previously. This petition for reargument was denied on April 16, 1951, and thereupon, the decision of that Court became final. This Court has held that the judgment

of a State Court becomes final for purposes of review in the federal Supreme Court by writ of error or certiorari, in a case in which a petition for rehearing is entertained, upon the date of the denial or other disposition of such petition. See: *Citizens' Bank vs. Opperman,* supra.

Thereafter, the petitioner had a period of ninety days within which time she could petition for a writ of certiorari or show cause to a Justice of this Court why she should be granted an extension. See: U.S.C. Title 28, Sec. 2101 (c). She did neither. Instead, on June 22, 1951, Petitioner filed a pleading entitled "Petition for Leave to File a Second Petition for Reargument". This pleading was clearly out of order and is now claimed by Petitioner as one which tolled the running of the ninety-day period. It was denied without comment by the Supreme Court of Pennsylvania on July 20, 1951, several days after the ninety-day period had expired. It is to be noted that it was not a Petition for Reargument nor is Respondent able to locate any authority for such a pleading. If Petitioner could toll the ninety-day period by such subterfuge, the decision of a state court would never become final since filing such a petition is a simple matter.

Now, for the first time, Petitioner raises a federal question in paragraph five (5) of the said Petition for Leave to File a Second Petition for Reargument (Record page 613). Petitioner alleges that rights protected to her by the Fourteenth Amendment to the Constitution of the United States have been violated by the decision of the Supreme Court of Pennsylvania. Respondent submits that the presentation of a federal

question at such time is out of order. This Court has held that even where a federal question is initially raised in an assignment of errors filed in the highest state court, which refused to consider any issue not presented to the trial court, the jurisdiction of the Supreme Court of the United States cannot attach. See: *Bailey vs. Anderson,* 326 U.S. 203, 206-7.

Going one step further, this Court has repeatedly held that raising the federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless the court actually entertains the petition and expressly decides the question. See: *Radio Station WOW vs. Johnson,* supra, 128; *Herndon vs. State of Georgia,* 295 U.S. 441, 443; *American Surety Co. vs. Baldwin,* 287 U.S. 156; *Forbes vs. State Council,* 216 U.S. 396; *Simmerman vs. Nebraska,* 116 U.S. 54. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied. See: *Consolidated Turnpike Co. vs. Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-4; *Forbes vs. State Council,* supra, 399; *McCorquodale vs. Texas,* 211 U.S. 432, 436-7. There must be language indicating that the federal question was considered and disposed of. In other words, the court must exert its jurisdiction "in such a way that the case could have been brought here had the questions been raised prior to the original disposition". *Radio Station WOW vs. Johnson,* supra, 128.

In the instant cause, the so-called federal question raised by Petitioner was not raised in her Petition for

Reargument. The Court did not entertain the Petition for Leave to File a Second Petition for Reargument nor did it do more than simply state "Petition dismissed. Rehearing denied. Per Curiam: July 20, 1951." (Record, page 598).

It is well settled that, before this Court will review a decision of a state court, it must affirmatively appear from the record that a federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. See: *U.S. ex rel. Herge vs. Commonwealth of Pennsylvania,* 89 F. Supp. 636, 639. In the instant cause, no federal question was ever raised before the State Courts bringing Petitioner within the scope of the above cited authority.

III. The Construction of a Will by State Courts Is Binding upon Federal Courts

The Supreme Court of Pennsylvania had before it for determination one principal question. The Sixth clause of George W. Nevil's Will provided:

> "Sixth: All the bequests, legacies and devises herein contained are to be free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any Municipal authority thereof, which taxes are to be paid by my estate."

The question involved was whether or not this clause was broad enough to include within its scope personal

income taxes imposed by the United States Government against the petitioner personally. This was simply a matter of construction and was, of course, to be controlled by certain legal principles used by Pennsylvania Courts in construing Wills, legal principles that have been long and well established in the law of Pennsylvania. For example: It is well settled that the intent of the testator is to be gathered from the whole Will, i. e. from the language within its four corners. See: *Shareff's Estate,* 143 Pa. Super. 465, 17 A. 2nd 623. The question is not what the testator probably intended but only what intention is expressed in the language used. See: *Conner's Estate,* 346 Pa. 271, 29 A. 2nd 514. It is true that we must put ourselves in the testator's place in order to determine what he meant by his Will, but when we have reached that coign of vantage, we must still declare the meaning of the language used, and not some other possible but undisclosed purpose. See: *Yates's Estate,* 281 Pa. 178, 126 A. 254. Interpretation is never to assume the proportion of reformation. See *Jacob's Estate,* 343 Pa. 387, 22 A. 2nd 744. And while extrinsic evidence may be admitted to aid or explain that which appears on the face of the Will, such evidence must always relate to that which is embodied in the Will. The controlling principle regarding the admission of such testimony is that it cannot be received as evidence of the testator's intention outside of and independent of the written words employed. See *Reinheimer's Estate,* 265 Pa. 185, 189, 108 A. 412, 413.

It was in the light of these principles that the Supreme Court of Pennsylvania concluded that "dece-

dent's Will does not thus specifically provide that the estate should pay the taxes *on the income* received by appellant from the trust and which she would otherwise be obliged to pay." (Record, page 602).

Our federal courts have long recognized that local law determines the right to make a testamentary disposition of property and the conditions essential to the validity of Wills and that it is the province of state courts to settle the construction of Wills. See *Lyeth vs. Hoey,* 305 U.S. 188, 193. The judicial construction of a Will by the State Court determines not only legally but practically the extent and character of the interests taken by the legatees *and is binding on the federal court.* See: *Sharpe vs. Commissioner of Internal Revenue,* supra, 14, and cases cited therein.

Respondent therefore submits that the construction placed upon the decedent's Will in the instant cause is not reviewable by this Court.

IV. There Has Been no Denial of Due Process to the Petitioner

As the record clearly discloses, this is the first time in these proceedings that the Petitioner has alleged a contract between the decedent and the Petitioner. Petitioner cites Record Vol. 1, page 1402 as the place where she attempted to prove this alleged contract. Reference to that page discloses that this alleged contract, if it may even be termed that, must have been an alleged contract for services of some sort. Yet Pe-

titioner's counsel, Mr. Schofield, states to the lower court on the subsequent page that it was "Not a claim for services." (Record Vol. 1, page 1412).

Needless to say, no exceptions were ever filed to indicate that Petitioner was dissatisfied with the court's ruling. Petitioner's attempt to raise such a question at this stage of the proceedings is obviously and patently a belated attempt to grasp at any straw in order to reopen a case, the adjudication of which is beyond appeal and final in every sense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States

No. 348.

October Term, 1951.

MARY K. ELLIS,
Petitioner and Appellant Below,

v.

GIRARD TRUST COMPANY, Surviving Trustee Under the Will of GEORGE W. NEVIL, Deceased,
Respondent and Appellee Below.

Petitioner's Reply Brief.

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Supreme Court of the United States.

No. 348.

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MARY K. ELLIS,

Petitioner,

v.

GIRARD TRUST COMPANY, Surviving Trustee Under the Will of GEORGE W. NEVIL, Deceased,

Respondent.

PETITIONER'S REPLY BRIEF.

1. The Petitioner denies that the petition for writ of certiorari is out of time.

The record clearly shows that the Petition for certiorari was filed in time. The last action of the Supreme Court of Pennsylvania took place on July 20, 1951. The petition for certiorari was filed on September 22, 1951. Until the Supreme Court of Pennsylvania acted on July 20, 1951, the petitioner was unable to file her petition for certiorari as the record was not complete until that time.

The Supreme Court of Pennsylvania could not have certified a full and complete record to this Court, because a petition for rehearing was pending before the Supreme Court of Pennsylvania until July 20, 1951. Petitioner thereafter acted promptly, having filed the present petition on September 22, 1951.

2. It is further averred that the federal question now before this Court was fully before the Supreme Court of

Pennsylvania and fully considered by it, because the petition for rehearing was before the Supreme Court of Pennsylvania for 28 days—to wit: June 22, 1951 to July 20, 1951. (Pp. 613 and 614 of the record specifically and all through the record generally.)

See Stern and Eugene Cressman on "Supreme Court Practice," Page 71, and cases therein cited.

At the time of the printing of the record, counsel for petitioner requested the Prothonotary of the Supreme Court of Pennsylvania to attach to the record a Certificate to the effect that the federal question had been raised and decided. He was advised that a separate Certificate was not necessary as the certified record clearly showed this was fully considered and acted upon by the Pennsylvania Supreme Court before dismissing the petition. *He has again called upon the Prothonotary of the Supreme Court of Pennsylvania and has been again advised that a certificate is unnecessary as the record certified to Your Honorable Court is the full record and clearly shows that the said Court considered and acted upon the Federal question when it dismissed the prayer of the petition.*

3. It is denied that the construction of a Will by State Courts is *in all* cases binding upon Federal Courts. It may be *in some cases but not in others.* Where the construction placed upon certain phraseology results in preventing a testator from making a Will as he wishes, there being nothing illegal about his wishes, or the action of the State Courts violates the 14th Amendment by denying the parties the right to contract or taking from one his property without due compensation, or otherwise denies him due process, there as well as in many other cases your Honorable Court should and does have jurisdiction.

There are lots of cases in which your Honorable Court has assumed jurisdiction in the matter of Wills: The following are some of them:

The Supreme Court of the United States said in the case of *Colton v. Colton,* 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 1381:

> "the construction of a Will is governed by the intention of the testator, when not inconsistent with the rules of law."

See also *Kenaday v. Sinnolt,* 179 U. S. 606, 21 S. Ct. 233, 45 L. Ed. 339, *Bosley v. Wyatt,* 14 How. 390, 14 L. Ed. 468, and *Shriver v. Lynn,* 2 How. 43, 11 L. Ed. 172.

The intention of the testator must prevail in giving a construction to a Will; his expressed intention constitutes the law unless it conflicts with some established legal principle.

The intention of a testator is to be collected from the Will and from the circumstances under which it was made.

> *Dandridge v. Washington,* 2 Pet. 370; 7 L. Ed. 454.

In *Giles v. Little,* 104 U. S. 291, 26 L. Ed. 745, this Court said:

> "In ascertaining the intention of the testator, a Will should be construed in the light of the circumstances surrounding its execution and connecting the parties and the property devised with the testator and with the Will itself."

In *Colton v. Colton,* 127 U. S. 300, 8 S. Ct. 1164, 32 L. Ed. 138, it said:

> "The judicial interpretation of a Will aims at understanding the testator's intention according to the meaning of the words he has used deduced by considering the whole instrument and comparing its several parts in the light of the situation and circumstances which surrounded the testator when the Will was framed."

Thus, you will see it clearly depends upon the case as to whether the Supreme Court has jurisdiction.

Here the record shows the testator's plan, and that to carry out the plan it was necessary that the monthly gift to appellant should not be diminished. To accomplish this he used the broadest language possible, to wit: that

> "all the bequests, legacies and devises herein contained are to be free from any and *all* taxes lawfully *imposed or to be imposed by the United States Government or any State Government or any municipal authority thereof,* which taxes are to be paid by my estate."

What was her bequest? $7,000 a month, of course.

And that was to be "free from any and all taxes lawfully imposed or to be imposed by the United States Government or any State Government or any Municipal Authority thereof, which taxes are to be paid by my Estate." How could he say more clearly what he wished?

There can only be one conclusion that the Estate should pay *all* taxes that might in any way reduce the $7,000 a month which he figured was necessary to carry out his wishes. To hold otherwise was to deny him the right to make his Will as he wished and deprive her of her property without due process—all contrary to the 14th Amendment to the Constitution of the United States.

The answer of the Respondent, Girard Trust Company, Trustee, comes with poor grace, in this case, as it was the corporate fiduciary in the matter of Williamson's Estate cited in petitioner's brief, (a full copy of the opinion in which was submitted to your Honorable Court). *Substantially the same language appeared in our Will.* No appeal was taken by this fiduciary in the Williamson matter, but on the contrary it is paying out of the estate the income tax caused by reason of the monthly payments directed by the Will to be paid to that decedent's Widow. How the said fiduciary can reconcile its conduct in that case with its attitude in this case is more than we can tell. To say its position in the two cases was inconsistent is mild to say the least.

In view of the fact that a federal question is involved, the Respondent should welcome a decision by your Honorable Court in the above matter so that the question can be finally and fairly decided by the highest Court.

4. The Supreme Court has but to read the record to see that the testator had carefully planned the distribution of his estate. He took into consideration the effect *taxes of every kind* might have on it; and that this petitioner agreed to carry out his plan; it was his money and his estate and he had the right to do with it as he wished, provided he remained within the law. To deny the testator and the petitioner the right to carry out testator's wish and their agreement surely violated the 14th Amendment. To cause any tax on the $7,000 a month to be paid out of her money so received constituted a taking of her property and also violated the said Amendment, which this Court should not tolerate.

In this case, had the Trustee continued the investments in non-taxables, this question would not have arisen. It shifted the taxes to taxables, which caused this tax. *By doing so it increased the income, and almost $1,000,000 of income has accumulated in the hands of Respondent for a charity in the future. This at the expense of your petitioner. It furthermore was contrary to his will. Testator never intended petitioner, the first object of his bounty, as clearly appears by the will, to be penalized for the benefit of the future charity, which the record shows he named because he did not know what to do with his estate after petitioner died.*

The Court's attention is called to the fact that in this present case there was a divided Court, and the opinion of the minority clearly states what is right and fair, and is and should be the law of the land. While the Supreme Court of Pennsylvania did not have before it the opinion of Judge Holland (a very able Judge) in *Williamson's Estate*, 61 Montgomery L. R. 242, the opinion in that case shows Judge Holland's thought along the same lines as the minority in this case.

The Court's attention is particularly called to the fact that the record in this case shows that the Court below decided the matter first one way and then another, showing he himself was in doubt.

This case has attracted widespread attention and is an important one from every standpoint. A report of it has appeared in many law journals, tax magazines and daily papers all over the country, showing the decision is of National interest and importance.

A will is to be construed in its entirety. Every word and phrase is to be considered and given effect in the construction of a will. That is a basic and fundamental principle supported by numerous cases.

In the present case, if the testator had said nothing in his will as to taxes, or who was to pay them, the basic principles of construction and the federal revenue laws would have placed the tax burden upon your petitioner.

The decision of the Supreme Court of Pennsylvania has put the tax burden on your petitioner. The effect of that decision is to ignore the language used by the testator as to who was to pay the taxes, contrary to the aforesaid basic principle of law. Thus the Court's decision has placed an illegal and improper tax burden on your petitioner, causing her property to be taken from her without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

It is submitted that the questions raised are national questions, and the petition for certiorari should be granted and the question finally decided once and for all after full argument.

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Respondent and Appellee Below.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States.

No. 348. OCTOBER TERM, 1951.

MARY K. ELLIS,
Petitioner and Appellant Below.

v.

GIRARD TRUST COMPANY, SURVIVING TRUSTEE UNDER THE WILL OF GEORGE W. NEVIL, DECEASED,
Respondent and Appellee Below.

PETITION FOR REHEARING.

To the Honorable Fred M. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary K. Ellis, prays that this Court re-hear and reconsider its denial of the petitioner's petition for issuance of a writ of certiorari to review the decision of the Supreme Court of Pennsylvania in the above entitled case.

On September 22, 1951, your Petitioner filed with your Honorable Court a petition for writ of certiorari to the Supreme Court of Pennsylvania in the above matter. The Respondent subsequently filed its reply with your Honorable Court and copies of the same were served on Petitioner's counsel on October 25, 1951. Your Petitioner filed with your Honorable Court her reply brief on Saturday, *November 3, 1951.* On Monday, November 5, 1951, *two days later* (Sunday having intervened), your Petitioner's counsel received a telegram advising him that Petitioner's petition had been denied.

The history of the case, the questions presented, the law involved, the specifications of error and the reasons for granting the writ are all set forth in the Petition for Certiorari, the brief in support thereof and your Petitioner's reply to the Respondent's brief, to which reference is made, and will not be repeated here.

GROUNDS FOR GRANTING THE PETITION.

Your Petitioner feels that a serious error has been made by your Honorable Court in refusing certiorari, and submits that the Supreme Court of Pennsylvania has decided an important federal question of substance in conflict with the Fourteenth Amendment to the Constitution of the United States and applicable decisions of the Supreme Court of the United States.

Your Petitioner feels that she set forth in her reply to the Respondent's brief important matters, and there was a possibility that the time elapsed between her filing the reply brief and the action of your Honorable Court was so short that proper consideration was not given to the material therein contained.

She therefore feels that for this reason as well as other reasons hereinafter set forth she should file this petition for rehearing.

George W. Nevil, the decedent here, was this Petitioner's foster father. He was a bachelor and had lived with his sister and several brothers, all of whom predeceased him. They had raised this Petitioner from her childhood. The decedent was the last living member of his family, and he left no other near relatives. In making his will, the record shows your Petitioner was the first object of his bounty. He had set up for himself and your Petitioner, his ward, a certain scale of living, and he wished her to continue to so live after his death, and the record shows he made her promise so to do. He calculated what it was costing him to live as he did, and by his will he attempted

to provide for monthly payments to permit her to so live. In order that there might be no doubt as to her ability so to do, he provided that her gift of so much a month should be "free and clear of *all taxes* imposed or to be imposed by the United States, any state, or any municipality." At the time he died his estate was almost entirely invested in municipal bonds, the income from which was not subject to income taxes.

The Trustee under the will, however, on receiving the estate, shifted it from municipal or non-taxables into taxables. The result was that, while the income from the estate was much higher, the gift to your Petitioner of so much per month was, by reason of the income tax caused by the shift, greatly depleted—to such an extent that she has been unable to keep her promise with the decedent and live in the way she had so promised him. The estate's income by the shift in the securities was greatly increased. Your Petitioner, the chief object of decedent's bounty, however, did not benefit by this, but on the contrary her payments were depleted by the income tax caused thereby, although almost a million dollars excess income has accumulated to date for the benefit of the unformed charity. As stated, the record clearly shows that your decedent was the chief object of decedent's bounty and the provision for the unformed charity was only inserted because he did not know what to do with the fund after your Petitioner's death. Your Petitioner contends that the switch in the type of investments resulting in a great increase in her income taxes, constituted taking from her, without her consent, and contrary to the testator's direction, a large part of the income he intended for her. The result has been to accumulate a large fund for the unformed charity which was not the chief object of testator's bounty. She also contends that by approving that course of action the Pennsylvania Courts have denied to the testator the right to make a will as he wished, even though there was nothing unlawful in what he desired,

and furthermore the Courts have attempted to make his will for him.

True it is that ordinarily a State has charge of and jurisdiction over the distribution of estates therein and of the interpretation of wills relating to estates therein, but the Petitioner contends in so doing the State must not violate the Fourteenth Amendment to the Constitution of the United States and deny anyone interested due process. If it does, the matter becomes a federal one and the person so injured has the right of appeal to your Honorable Court.

See Michigan Law Review for November, 1951, Page 35, and the cases therein cited.

That is what the Pennsylvania Courts did here.

In the case at Bar the tax clause is very clear. The testator says just what he means, to wit, that his estate should pay all taxes imposed or to be imposed by the United States, or any State, or any municipality that affected the monthly payments to be received by your Petitioner, his ward, and the chief object of his bounty. He knew from personal experience that to live as he had lived—and the manner in which he had made her promise to live—it required the monthly amount he provided in his will she should receive. In order that she might be sure of the sum, he even provided that the fund from which the petitioner was to draw her income was not to become a part of his general residuary estate until her death. After her death he provided it should fall into the residuary fund and the income therefrom was to provide for the Home then to be formed. As heretofore stated, he had all his funds invested in municipal bonds, the income from which he knew was not subject to income tax. He never intended that the fund should be transferred to taxable securities by the trustees and cause the income from the reinvestments to become subject to such a tax that would deprive her of the benefit of the full monthly sum. He especially did not wish this and he tried in every way by his will to make it clear that she was the first object of his bounty

and should have the full sum. He certainly never intended that she should be penalized to the benefit of or the enrichment of the fund which would accumulate for the charities.

This case is so much like the case in "Williamson's Estate" (a printed copy of which was filed with the petition) in which the same trustee, Girard Trust Company, was also trustee, that your Petitioner cannot refrain from quoting from Judge Holland's opinion, on page 4 of the printed opinion filed with the Petition for Certiorari, to wit:

> *"We can only consider the exact meaning of the words used and they are so all-inclusive as to make it impossible to come to any conclusion but that any possible tax that would be a charge or encumbrance on the income is payable out of the residuary estate of the decedent. The testator employs every possible word available in the language and with the choice of the strongest to indicate his intentions. * * * Furthermore, when we consider that this annuity constitutes income and that the primary and essential tax on income is an income tax, it seems convincing that he intended tax on this sum to be paid out of the residue and we so hold."*

Our case is even stronger, because to pay the tax the trustee would not necessarily be depleting principal but the same would be paid out of the excess income of the estate caused by the shift in investments.

The Supreme Court of Pennsylvania raised a question as to the practicability of working out the amount of the tax. Your Honorable Court's attention is called to the suggestion of Judge Holland in said opinion showing in Williamson's Estate, *supra,* that it was not impracticable.

Petitioner contends she is being deprived of her property without due process of law by the effect of the decision of the Supreme Court of Pennsylvania which has put the tax burden on the Petitioner in spite of the tax clause in the will.

Where a will makes no provision as to taxes, the taxes have to be paid by the respective beneficiaries. The testator was aware of this. Hence he provided in his will that the estate was *to pay all taxes. The decision of the Supreme Court of Pennsylvania in effect completely ignores this part of the will. That action by the Supreme Court of Pennsylvania is contrary to the basic principle governing the construction of wills that every word in a will is to be considered. This the majority of the Supreme Court of Pennsylvania has failed to do, thereby causing Petitioner's property to be improperly taken from her.*

CONCLUSION.

Your Petitioner submits that the action of the Pennsylvania Court denies testator the right to make a will and without her consent arbitrarily takes from your Petitioner her property and gives it to another without due compensation, and therefore its decision, for this reason, as well as the other reasons set forth in the petition, violates the Fourteenth Amendment to the Constitution of the United States, and her petition for certiorari should be granted.

The undersigned counsel of record for the Petitioner certifies that this petition is presented in good faith and not for delay.

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